

Nguyen (Migration) [2019] AATA 6356 (22 November 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Thu My Thi Nguyen

VISA APPLICANTS: Ms Thi Hoang Mai Nguyen
Miss Anh Thu Ta
Master Anh Khoa Ta
Master Chi Thanh Nguyen

CASE NUMBER: 1722824

DIBP REFERENCE(S): OSF2016/038851 OSF2016038851

MEMBER: David Crawshay

DATE: 22 November 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations; and
- r.2.03A.

Statement made on 22 November 2019 at 5:23pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional) – genuine and continuing relationship – shared finances – shared housework – plan and undertake joint social activities – mutual commitment to shared life to exclusion of all others – companionship and emotional support – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 2.03A, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP[2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 July 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) is Ms Thi Hoang Mai Nguyen, 51, who is a Vietnamese citizen. The secondary visa applicants comprise her biological children Miss Anh Thu Ta and Master Anh Khoa Ta, and her adopted child Master Chi Thanh Nguyen. All are under the age of 18 at the time of this decision.
3. The visa applicant applied for the visa on 14 October 2016 on the basis of her relationship with her sponsor, Ms Thu Thi My Nguyen, 40, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the visa applicant did not meet the definition of de facto partner under s.5CB of the Act.
5. The review applicant appeared before the Tribunal on 29 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, as well as the review applicant's two children, Mr Kha Tan Tai Nguyen and Miss Kha Tuyet Thao Nguyen. The Tribunal also interviewed a Ms Thi Huong Ngo, a friend of the review applicant.
6. The review applicant was represented in relation to the review by her registered migration agent, who attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The claimed facts of the matter are as follows.
9. The review applicant came to Australia with her two children in October 2007 as the holder of a Prospective Marriage visa (TO-300). She was granted a Partner (Residence) visa (BS-801) in July 2010. In August 2010, the review applicant claims that she and her then-sponsor divorced. She commenced a same-sex relationship with a Vietnamese citizen and sponsored her to come to Australia in 2011. In 2013, her partner was granted a Partner (Migrant) visa (BC-100). In February 2015, the review applicant legally separated from her then-partner, although she gave evidence that the relationship has ceased before that, in June 2014. She was conferred Australian citizenship in June 2014.
10. The visa applicant was married in 2003. She separated from her ex-spouse in August 2014 and they were legally divorced in November 2014.
11. The parties met in early-June 2014 in Trung Hieu, where the visa applicant lives. This was also the village where the review applicant lived until she moved to Australia, and the parties

stated to the Tribunal that they did know each other vaguely before the review applicant moved (the visa applicant had visited the review applicant's family upon the death of the review applicant's mother in 2007).

12. The parties met at a coffee shop at the Trung Hieu market, having noticed each other a couple of days before at the same coffee shop. The review applicant invited the visa applicant to have dinner at her aunt and uncle's place that night, and over the course of the next few days they opened up to each other. The review applicant confided in the visa applicant some of the difficulties she had been experiencing with her ex-de facto partner. The review applicant told the visa applicant that she liked her. By the end of the review applicant's trip, she felt like the parties loved each other, but that they needed to sort out their family situations.
13. The parties shared contact details during this period and they communicated with each other after the visa applicant returned to Australia. For the review applicant, this was by way of pre-paid phone cards although she used to go to a local internet café to make video calls. The parties spoke every day during this period.
14. The review applicant returned to Vietnam in September 2014 for a period of four months. The purpose of the review applicant's travel to Vietnam was to live with the visa applicant and her two biological children at the house of the aunt and uncle of the review applicant. The parties began identifying as a de facto couple at this stage. They stayed in and around Trung Hieu, travelling within the province. They had professional photographs taken to simulate a wedding couple (with the visa applicant wearing a traditional dress and the review applicant a shirt with a vest). The review applicant returned to Australia at the end of January 2015. The visa applicant continued to reside at the house of the review applicant's aunt and uncle, along with her children.
15. In March 2015, the visa applicant legally adopted a child, Master Chi Thanh Nguyen, who is one of the secondary applicants.
16. In February 2016, the review applicant again travelled to Vietnam and stayed with the visa applicant and her children at the house of her aunt and uncle. The parties held a celebration at the house to publicise their relationship in March 2016 in front of friends. Shortly after this, in April 2016, the parties (and the visa applicant's children) were able to move into a house that had been given to them by the review applicant's aunt and uncle. The review applicant returned to Australia in February 2017 – a stay of almost one year.
17. During that stay, on 12 September 2016, the visa application was lodged.
18. The review applicant travelled to Vietnam on four subsequent occasions – for almost two months from July to September 2017; for over nine months from October 2017 to August 2018; for four-and-a-half months from October 2018 to March 2019; and for almost four months from May to September 2019. During these periods, the parties lived together.
19. The parties held a wedding ceremony in Vietnam in December 2017. By the parties' own account, the wedding was not a legal wedding.
20. In July 2018, the visa applicant submitted an application for a Visitor visa (FA-600) to come to Australia, the purpose of which was to return to Australia with the review applicant. In early-August 2018, a delegate of the Minister refused the application.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in the present case is whether the visa applicant is the de facto partner of the review applicant.

Whether the parties are in a spouse or de facto relationship

22. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

23. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
24. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects of the relationship

25. The Tribunal has considered any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses in assessing the financial aspects of the relationship.
26. The parties gave evidence that they reside in a house which was given to them by the aunt and uncle of the review applicant, and a title for the property was provide to the Tribunal. It must be said at this stage that the review applicant's aunt and uncle emerge as her financial sponsors. When asked how the review applicant is able to travel so extensively back-and-forth from Vietnam given that she is the recipient of Centrelink payments, she replied that she would have her travel paid for by them. The house is in the name of the visa applicant. When asked by the Tribunal why the property was not owned jointly, the review applicant replied that the registrar denied her request to do so because it must be registered by husband and wife. The Tribunal accepts this explanation. The parties also gave evidence at hearing that they jointly operate a public swimming pool, and have submitted a contract dated 18 January 2016 which shows the review applicant's uncle as the "Investor". The parties submitted several receipts for payment of energy bills in respect of the swimming pool which names them as the customers. The parties claim that the visa applicant manages the pool, while the review applicant operates the surveillance cameras off-site by way of a mobile application, and evidence in the form of screenshots of the surveillance application was provided in support of this claim. The Tribunal accepts that the parties jointly manage the swimming pool.

27. The Tribunal finds that the parties have integrated their finances to a moderate degree through operating this swimming pool business jointly, and this aspect is given moderate weight in the Tribunal's consideration of the financial aspects of the relationship.

Nature of the household

28. The Tribunal has considered any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework in assessing the nature of the household.
29. The parties each have children of their own – the review applicant has a son and daughter, while the visa applicant has a biological son and daughter, as well as an adopted son. The parties gave no evidence that there was any formal arrangement for joint responsibility for their care and support. The review applicant submitted that her children enjoy a good relationship with the visa applicant, and this was confirmed by her son at hearing. It is worth noting at this point that the review applicant's children have taken extended holidays in Vietnam over the summers of 2014/15, 2016/17 and 2017/18, during which time they have stayed with the parties. The parties submitted receipts (untranslated) for school fees in respect of the visa applicant's children. The review applicant submitted that the parties had paid for these jointly. While, on their face, these receipts would appear to confirm that the parties jointly provide for the visa applicant's children, it is difficult for the Tribunal to be able to verify these given that they are untranslated. They are therefore given limited weight. The parties' children appear to get along well with each other, and are seen together in numerous photographs with the parties. At hearing, the review applicant's daughter became visibly distressed when talking about how she misses seeing them. The Tribunal gives this evidence some weight in its overall consideration of the nature of the parties' household.
30. Turning to the parties' living arrangements, they claim to have been living together for extended periods in each year from 2014 to today. They claim to have initially lived in the residence of the review applicant's uncle and aunt, before moving into a house of their own which was given to them by the uncle and aunt. The parties presented consistent testimony as to the details of their living arrangements during the times they claim to have been together in Vietnam, including particulars of their accommodation such as layouts and who slept where, and the Tribunal is satisfied that they lived as claimed during those periods. It gives this evidence significant weight in its finding that the parties did not live separately and apart on a permanent basis at the time of application, and do not live separately and apart on a permanent basis at the time of this decision.
31. The parties described with specificity the household tasks that they perform and the Tribunal is satisfied, based on their consistency, that they shared the housework when they were together. It gives this evidence moderate weight in its overall consideration of the nature of the household.

Social aspects of the relationship

32. The Tribunal has considered whether the parties represent themselves to other people as being in a de facto relationship with each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities in assessing the social aspects of the relationship.
33. The parties have submitted numerous photographs and social media posts. Many of these show the parties at their wedding celebration in December 2017, which was attended by friends, family and relatives of both parties, including the parties' children. The wedding, although not official, featured some of the hallmarks of a traditional Vietnamese wedding, such as the procession of the groomsmen's party (in this case, the review applicant) to the

bride's house to receive the bride. There was also an exchange of vows and a reception. It appears the celebration was elaborate, featuring a motorcade to the reception venue by both parties and a number of costume changes, and it was well-attended. The Tribunal accepts this evidence and gives it significant weight in demonstrating that the parties represent themselves to other people as being in a de facto relationship with each other, and that the parties' relationship is genuine and continuing.

34. In the other photographs and social media posts submitted, there is a roughly even split between those which capture only the parties in each other's company, and those which show them with others such as friends and family. These photographs and social media posts date from October 2015 and include events such as the parties' relationship celebration in March 2016 and the various holidays the parties have taken. It is clear from even a cursory look at the photographs that the parties do not hold back from showing their affection towards each other, whether by themselves or in the presence of others. They hold hands, they have their arms around each other, they are next to each other all the time. It is difficult to escape the conclusion that those other people in the photographs would regard the couple as intimate and would accept their relationship as being genuine. Again, the Tribunal accepts this evidence as demonstrating that the parties represent themselves to others as being in a de facto relationship.
35. The parties submitted no declarations or statements by friends and family attesting to the genuineness of the relationship. However, the Tribunal did have the benefit of interviewing a friend of the review applicant, Ms Thi Huong Ngo, who grew up in the same village. Ms Ngo told the Tribunal that she has been in Vietnam at the same time as the review applicant and has witnessed the parties together during her visits, most recently in April 2019. When asked why she believed the parties' relationship was genuine, she replied that she saw first-hand how they expressed their emotions towards each other and how they love each other.
36. The Tribunal accepts this evidence, along with the photographic evidence above, and gives it moderate weight in its consideration of the opinion of friends and acquaintances about the nature of the relationship.
37. Turning lastly to the basis on which the parties plan and undertake joint social activities, the Tribunal notes that the parties have given documentary and oral evidence of extensive travelling, both within Vietnam to places such as Can Tho, Nha Trang, Ben Tre and Ca Mau, and to other countries such as Singapore and Malaysia. Some of this travel they have done with their families; some they have done alone as a couple. The parties have also marked events such as their own birthdays and the birthdays of their children. The Tribunal gives this evidence substantial weight in demonstrating that the parties' relationship is genuine and continuing.

Nature of the parties' commitment to each other

38. The Tribunal has considered the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term in assessing the nature of the parties' commitment to each other.
39. The parties claim to have met in June 2014, before forming a de facto relationship in September 2014. They claim to have celebrated their relationship at a party in March 2016 before conducting a wedding (albeit not a legal wedding) in December 2017.
40. The parties were not able to provide the Tribunal with any contemporaneous photographic evidence, nor any communication records from that time. However, based on the consistency of the parties' testimony at hearing as to how they met, the Tribunal is satisfied

that they met as claimed in June 2014. For the same reason, the Tribunal is also satisfied that they met again in September 2014 and began some form of relationship. As stated above, the Tribunal is satisfied that the parties lived together as claimed during extended periods since, totalling roughly 1,100 days out of the last five years or so. In other words, they have spent more time with each other than not since they met. The Tribunal notes the duration of the parties' relationship and the length of time that they have lived together and gives it significant weight in finding that the parties have a mutual commitment to a shared life together to the exclusion of all others.

41. In the photographs and social media posts submitted, the parties are shown doing all manner of activities together, from attending church (of which more is below), to cooking, to travelling together. As stated before, their wedding in December 2017 is well-featured among the photographs submitted. In all the photographs, without fail, the parties are close to each other and appear happy, relaxed and at ease with each other. The Tribunal considers that the photographs accurately capture the companionship between the two parties. The review applicant's son told the Tribunal that the parties never appear to get too angry with each other and that instead they "speak it out". The review applicant's daughter said that her mother had sacrificed in order to continue the parties' relationship.
42. The review applicant was admitted for a major surgical procedure while in Vietnam in June 2019 and evidence in the form of receipts for treatment, accommodation and medicines, along with a discharge summary corroborates this claim. The parties claim that the visa applicant was with the review applicant when she was admitted to hospital, and the Tribunal accepts this and gives it moderate weight.
43. The parties gave consistent testimony in relation to their partner's personal details. In particular, the visa applicant displayed a detailed knowledge of the review applicant's children.
44. Finally, the Tribunal notes that the parties are devoted Catholics who appear to attend church regularly. The review applicant gave evidence that she wanted some involvement by the church in their wedding celebration in December 2017, but had been advised by a priest that this would not be possible. Further, she said that while the parties attend church, they are not able to take communion, such is the stance of the Church on the issue of homosexuality. In this regard, the parties appear to have suffered for their relationship, and the Tribunal accepts that this is another manifestation of their commitment to each other and to their relationship.
45. Taken together, this evidence is given substantial weight by the Tribunal in assessing the degree of companionship and emotional support the parties draw from each other.
46. Turning to the question of whether the parties see their relationship as long-term, the Tribunal notes that they have a business together in Vietnam as well as a property. When asked what would become of these assets, the review applicant replied that she would give these to her uncle to manage before having them sold and using the proceeds to open a restaurant in Australia. The Tribunal has not had the opportunity to verify this information with the review applicant's uncle, but concedes that it may be true given her uncle's status as her benefactor. When asked where the visa applicant's children would attend school, the review applicant said she had not made enquiries as yet but indicated that they would probably attend the school where her two children go in Collingwood. The Tribunal accepts that the parties have made provision for their future together and gives this evidence some weight.

Are the parties related to each other?

47. Based on the evidence given by the parties at hearing, the Tribunal is satisfied that the parties are not related to each other.

Conclusion as to the de facto criteria

48. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.
49. Therefore, the visa applicant meets cl.309.211 and cl.309.221.

Are the additional criteria for a de facto relationship met?

50. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the visa applicant and the review applicant were at least 18 years old.
51. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the review applicant held, holds or is applying for a permanent humanitarian visa.
52. There is no evidence that the relationship is registered under a relevant State or Territory law or that the review applicant held, holds or is applying for a permanent humanitarian visa, so they must meet the 12-month requirement. Given that the visa application was lodged 12 September 2016, this means that the parties needed to have been in a de facto relationship for a continuous period starting in September 2015.
53. The Tribunal is satisfied that the parties had known each other for at least 15 months by September 2015. The Tribunal also accepts that the parties entered into some type of relationship in September 2014, meaning that a relationship of some type was on-foot for just less than 12 months by September 2015, or just less than two years by the time of visa application. Further, by this stage, the Tribunal is satisfied that both parties had extricated themselves legally and emotionally from their previous relationships.
54. The Tribunal has given weight to the fact that the parties had lived together with the visa applicant's children for some four months by the time of September 2015. They therefore lived and operated as a de facto couple and family for an extended amount of time by that point. Although they appear not to have represented their relationship to others until around March 2016 when they held a party to recognise their relationship, there are good reasons for this, including that the visa applicant at that point feared the effect of rumours about their relationship on her children. The Tribunal believes that the visa applicant's reluctance to publicly represent her relationship with the review applicant should not tell against the parties being in a de facto relationship at this point given the stigma that attached to these types of relationships (and gays and lesbians in general) in some parts of Vietnam, especially outside of major cities.¹

¹ Department of Foreign Affairs and Trade, 'FAT Country Information Report - Vietnam'(31 August 2015) 14:

While specific examples of societal discrimination are difficult to uncover, DFAT assesses that the risk of societal discrimination against LGBTI people in Vietnam is moderate, particularly outside the major

55. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12-month period ending immediately before the date of the application.
56. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.

CONCLUSION

57. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa, including in respect of the secondary visa applicants.

DECISION

58. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

David Crawshay
Member

cities, where ongoing traditional values make social and family acceptance of LGBTI people uncertain.

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).